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No. 86-583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIM AUSTIN and AULEMIC, INC.
Petitioners,
vs.
LEXINGTON INSURANCE COMPANY
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied existing Texas law in this case.

2. Whether there is presented in this case a sufficient question for review by this Court.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the case is erroneous. It includes several versions of fact which were argued for below by Petitioner, but which either were not found below or were reversed by the court of appeals. It also inaccurately states the action of the court of appeals.

The opinion by the court of appeals[1] correctly indicates that no long term charter was in effect between Austin and Servac, and that Servac's refusal further to employ the vessel was unrelated to any action of Lexington.[2] Furthermore, the court of appeals correctly states

[1] 794 F.2d. 941 (5th Cir. 1986); page 5a, Petition Appendix A.
[2] 794 F.2d. at 946; page 15a, Petition Appendix A.

the sequence of actions by Lexington, which did not include a denial of coverage based on a misstatement of maritime law, or a summary closing of the claim file.[3] Lastly, the court of appeals did not refuse to apply Texas law, but simply reached the conclusion that applicable Texas law did not provide a cause of action for treble damages to the insured on the facts of this case.[4]

SUMMARY OF THE ARGUMENT

Contrary to the contentions of Petitioner, the court of appeals reached a principled decision correctly applying amply established Texas authority, their own rules of decision, and the decisions of this Court. Consequently, there is no basis or reason for review by this Court.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Correctly Applied Texas Law As Established By Substantial Authority To Conclude That Petitioner Had No Cause Of Action For Treble Damages On The Facts Of This Case.

If the court of appeals made any error in their opinion, it was in citing only the most recent opinions of Texas courts of appeal which hold that Article 21.21 of the Texas Insurance Code, upon which Petitioner relies, does not provide the insured a cause of action for treble damages for unfair claim settlement. The court of appeals cited *Texas Farm Bureau Mutual Insurance Co. v. Vail*[5] and *Chitsey v. National Lloyds Insurance Co.*[6]. They also

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[3] 794 F.2d. at 942; page 5a, Petition Appendix A.

[4] 794 F.2d. at 947-949; pages 18a-20a, Petition Appendix A.

[5] 695 S.W. 2d. 692 (Tex. App.—Dallas 1985, writ requested).

[6] 698 S.W. 2d. 766 (Tex. App.—Austin, 1985, writ granted).

cited two federal district court opinions from Texas, *Lexington Insurance Co. v. Bennett Evans Grain Co.*[7] and *South Texas National Bank of Laredo v. United States Fire Insurance Co.*[8].

All four of the cases relied upon by the court of appeals are based upon the substantial body of decisional law in the Texas courts of appeal reaching back to 1977, shortly after the enactment in 1973 of the Texas Unfair Claim Settlement Practices Act[9]. The earlier cases in the Texas courts of appeal were collected by the U.S. district court for the Northern District of Texas in *McKnight v. Ideal Mutual Insurance Co.*[10]. These earlier cases include: *Hi-Line Electric Co. v. Travelers Insurance Co.*[11]; *Alvarez v. Westchester Fire Insurance Co.*[12]; *Lone Star Life Insurance Co. v. Griffin*[13]; and *Russell v. Hartford Casualty Insurance Co.*[14].

Of the more recent Texas courts of appeal cases, *Vail* relies upon *McKnight* and the authorities cited therein, and upon *Lone Star*[15]. *Chitsey* relies upon *Vail.* A subsequent 1986 Texas court of appeals opinion to the same effect, *Christensen v. Integrity Insurance Co.*[16], relies

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[7] No. G-84-184 (S.D. Tex. Feb. 27, 1986), unreported, copy in Appendix A.

[8] No. L-83-34 (S.D. Tex. Jan. 10, 1985), unreported, copy in Appendix B.

[9] Article 21.21-2, Texas Insurance Code.

[10] 534 F.Supp. 362 (N.D. Tex. 1982).

[11] 587 S.W. 2d. 488 (Tex. Civ. App.—Dallas, 1979), writ ref'd. n.r.e. 593 S.W. 2d. 953 (Tex. 1980).

[12] 562 S.W. 2d. 263 (Tex. Civ. App.—San Antonio) rev'd other grounds, 576 S.W. 2d. 771 (Tex. 1978).

[13] 574 S.W. 2d 574 S.W. 2d. 576 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

[14] 548 S.W. 2d. 737 (Tex. Civ. App.—Austin, 1977, writ ref'd n.r.e.).

[15] Supra, notes 5, 10 and 13.

[16] 709 S.W. 2d. 724 (Tex. App.—Houston [14th District] 1986), rev'd. on other grounds ___ S.W. 2d. ___, 30 Tex. Supp. Ct. Jour. 37 (1986).

upon *Lone Star*[17]. In the federal courts, *Bennett Evans* relies on *McKnight* and the cases collected therein, and upon *Vail* and *Chitsey.*[18] *National Bank of Laredo* relies upon *Lone Star* and *Hi-Line Electric.*[19]

A detailed discussion of the holdings in each of these cases would be lengthy. Such a discussion would also be largely irrelevant to the question before this Court because the rationale of each case and the precise holdings vary, depending both on the facts presented and the variations in the possible application of Texas common law, Texas statutes, and administrative regulation which were suggested by the ingenuity of counsel. The most comprehensive review of the possible causes of action under Texas common law, the Texas Insurance Code, the Texas Deceptive Trade Practices Act, their interlocking provisions, and the orders of the Texas Insurance Board, in the context of a claim against a property insurer, is found in *Bennett Evans Grain*[20]. A review of that case, and the others cited above, leads inevitably to the conclusion that there is no statute or combination of statutes and Texas common law under which a property insurer is liable to the assured for treble damages for improper handling of a claim, much less for failure to pay a disputed claim. A remedy for unfair claims handling *practices* is reserved to the Texas Insurance Board. This is particularly true where, as in the instant case, no claim is made under Texas common law or the Texas Deceptive Trade Practices Act, and reliance is placed on Article 21.21, Texas Insurance Code, and the board orders.

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[17] Supra note 13.

[18] Supra notes 5, 6, 7, 10.

[19] Supra notes 8, 11, 13.

[20] Appendix A, pp. A-5 to A-10.

Texas authority to the effect just discussed is consistent. It is quite incorrect to assert, as does Petitioner, that *Royal Globe Insurance Company v. Bar Consultants, Inc.*[21], is applicable to this case, or involves the identical violation as in the instant action.[22] In noting that the Texas decisions were consistent on the inapplicability of Article 21.21 to unfair claim settlement cases[23], and omitting reference to *Royal Globe,* the court of appeals paralleled the reasoning of the district court in *McKnight*[24], which specifically pointed out the inapplicability of *Royal Globe* to a claim for improper claims handling, accurately describing and distinguishing *Royal Globe* as a misrepresentation case.[25] The district court in *National Bank of Laredo* did the same.[26] *Royal Globe* involved misrepresentation by an agent to an assured of the coverage of a policy both before and after a loss occurred. It is likewise entirely incorrect to argue, as does Petitioner, that in *Mayo v. John Hancock*[27], the Texas supreme court held that Art. 21.21(16) allows a private cause of action for treble damages. *Mayo* involved a summary judgment on the issue of whether recovery of actual damages under Art. 3.62 of the Texas Insurance Code barred the recovery of damages under Art. 21.21(16) or the Texas Deceptive Trade Practices Act. The Texas supreme court held that the Texas court of appeals had misinterpreted § 17.43 of the Texas Deceptive Trade Practices Act, and disclaimed any ruling on the question of treble damages under the Texas Insurance Code and the Deceptive Trade Practices Act.[28]

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21 577 S.W. 2d. 688 (Tex. 1979).

22 Petition p. 8, Note 10.

23 794 F.2d., 949, Note 8; page 20a, Petition Appendix A.

24 Supra, note 10.

25 534 Fed. Supp. at 366.

26 Appendix B, p. B-4.

27 711 S.W. 2d. 5 (Tex. 1986).

28 711 S.W. 2d. at 7.

Since the two decisions from the Texas supreme court cannot be characterized as they are by Petitioner, it follows that the court of appeals most certainly did not, as argued by Petitioner, render a decision contrary to decisions of the Texas supreme court.[29] The statement by Petitioner that the holding of the district court was based on decisions from the Texas supreme court "which have uniformly awarded treble damages against insurers engaging in unfair claim settlement practices"[30] is likewise erroneous. The district court cited only *Royal Globe,* an inapplicable case already discussed.

At various stages of review by the court of appeals, Petitioner argued other cases in the Texas courts of appeal in support of his position: *Allstate Insurance Co. v. Kelley*[31]; *St. Paul Insurance Company v. McPeak*[32]; *Aetna v. Marshall*[33]; and *Arnold v. National County Mutual Fire Insurance Co.*[34]. *McPeak* is a workman's compensation case in which, as pointed out by the court of appeals[35], the assured brought suit after the insurer terminated his workmans compensation benefits. The Court specifically disclaimed a ruling on the Article 21.21 issue[36]. *Kelley* is a case involving negligent mishandling by a liability insurer of automobile litigation brought by a third party against

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[29] Petition, p. 5.

[30] ibid.

[31] 680 S.W. 2d. 595 (Tex. App.-Tyler, writ ref'd. n.r.e.).

[32] 641 S.W. 2d. 284 (Tex. App.-Houston [14th District] 1982, writ ref'd. n.r.e.).

[33] 699 S.W. 2d. 896 (Tex. App.-Houston [1st Dist.] 1985, writ granted).

[34] (Tex. App.-Houston [1st Dist.] August 22, 1985, writ granted) not reported, copy in Appendix C.

[35] 794 F.2d. at 949, note 8; page 20a, note 8, Petition Appendix A.

[36] 641 S.W. 2d. 288.

an assured. Like *McPeak*, it was correctly distinguished by the court of appeals because it did not involve a property insurer[37] and because it arose from a problem other than claim handling. *Marshall* is another workman's compensation case, involving the enforcement of a judgment requiring an insurer to pay future medical expenses. It is not mentioned in the court of appeals opinion, presumably because it shares the same distinctions as *McPeak* and does not involve claim handling. *Arnold* involves a summary judgment on a statute of limitations issue and an issue of Texas common law regarding an implied duty of good faith and fair dealing not presented in the instant case. The Texas Supreme Court will review only those issues.[38]

In short, as the court of appeals points out,[39] the decisions of the Texas courts of appeal, rather than being split on the question of the applicability of treble damages to claim handling under Article 21.21 of the Texas Insurance Code, are consistent. As is apparent from a reading of its opinion, the court of appeals reviewed the applicable Texas case law as submitted by the parties in reaching their decision.

The assertion by Petitioner that the court of appeals created an exception for a marine property insurer, and declined to apply the Texas statute on the basis that the policy involved was one of marine insurance[40] are quite unfounded. Nowhere in the opinion of the court of appeals is any such reasoning to be found. The court of appeals correctly begins their analysis with *Wilburn Boat v. Fireman's Fund,*[41] and goes on to analyze Texas and

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[37] 794 F.2d. at 949, note 8; page 20a, note 8, Petition Appendix A.

[38] 29 Tex. Sup. Ct. Jour. 78.

[39] 794 F.2d. at 949, n. 8; page 20a, note 8, Petition Appendix A.

[40] Page 6 of Petition.

[41] 348 U.S. 310 (1955); 794 F.2d. at 948; page 18a, Petition Appendix A.

Florida state law. Their analysis repeatedly refers to the question of "whether Article 21.21 applied to a property insurer who failed to fairly handle a claim made by his insured"[42]. There is no distinction whatever made between a marine property insurer and any other property insurer.

Given the state of the law of Texas as set out above and as relied upon by the court of appeals, the court of appeals had ample precedent upon which to base its decision as to the law of Texas. In reaching its conclusion, the court of appeals relied on its own rule of decision, which holds that a decision of a Texas court of civil appeals is controlling on questions of Texas law in the federal court of appeals, absent a strong indication the Texas supreme court would decide the issue differently.[43] Given the substantial authority from Texas courts of appeal and the absence of any contrary authority, there could have been no justification for the court of appeals to certify the question to the Texas supreme court, as Petitioner urges should have been done.

Were it necessary to speculate on the possible action of the Texas supreme court, as the court of appeals would have been obliged to do had there been no authority from the Texas courts of appeal available to them, the Texas writ history of the Texas cases cited above would be instructive. The Texas supreme court can be seen to have undertaken to review a series of cases, recently decided,

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[42] e.g., 794 F.2d. at 948; page 19a, Petition Appendix A.

[43] *Birmingham Fire Insurance Co. v. Weingardner,* 714 Fed. 2d. 548 (5th Cir. 1983); *Mott v. Mitsubishi International,* 636 Fed. 2d. 1073 (5th Cir. 1981) and cases cited therein; *Continental Grain Co. v. Martin,* 536 Fed. 2d. 592 (5th Cir. 1976) cert. denied 429 U.S. 1024 (1976). Judge Brown's comments on the merits of certification, alluded to on page 9 of the Petition, are directed to situations in which a "guess" on an unclear point is involved, and pre-date the two more recent of these cases.

which involve various kinds of insurers, including property, and the question of treble damages under the complex interface created by Texas common law, various provisions of the Texas Insurance Code, the Texas Deceptive Trade Practices Act, and various administrative regulations issued thereunder or incorporated therein. The wide variety of factual situations and the wide variety of legal situations created by the variations in pleading and proof reviewed by the Texas courts of appeal have tended to create a gray area which lies between the clear misrepresentation of policy coverage present in *Royal Globe*[44] and the straightforward assignment of the cause of action for unfair claims handling practices to the State Board of Insurance under the Texas Unfair Claims Settlement Act.[45] The cases taken up consistently involve claims under the Texas Deceptive Trade Practices Act as well as the Texas common law question of the existence of an implied duty of good faith and fair dealing, neither of which are involved in the instant case. *Chitsey*, of which Petitioner makes much, as well as ruling on Article 21.21, has the latter issue. Given the existing condition of Texas authority regarding Article 21.21 discussed earlier, it is entirely erroneous to charge the court of appeals with having reached out to decide prematurely a new question before the Texas Supreme Court, as does Petitioner. It would appear most unlikely that the Texas supreme court would go so far as to upset ten years of jurisprudence in the Texas courts of appeal and allow treble damages for the simple non-payment of a disputed claim. It is far more likely that they would undertake a line-drawing exercise to set a boundary between the two extremes and eliminate the possibility of decisions such as that of the federal district court in the instant case, which was correctly reversed by the federal court of appeals.

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[44] Supra, note 19.

[45] Supra, note 9.

II.

The Instant Case Presents No Constitutional Issue, Issue Of Federalism, Of Uniformity Of Maritime Law, Or Any Other Issue Meeting The Standard For Review By This Court.

As pointed out in I above, and as plainly stated in the opinion, the court of appeals duly followed the guidance of *Wilburn Boat v. Fireman's Fund,*[46] as interpreted by *Kossick v. United Fruit Co.,*[47] in applying state law to a policy of marine insurance in the absence of a controlling federal rule on the subject.[48] In addressing the applicability of the Texas statute, the court of appeals makes no mention of the marine character of the policy at issue in concluding that the statute does not confer a cause of action. Thus, there is no issue presented here of failure to follow the dictates of this Court regarding the applicablity of state law to policies of marine insurance, or the oft-repeated admonitions of this Court on the subject of the desirability of uniformity in the maritime law and the law of marine insurance.

Because there is no such case, Petitioner cites no case to indicate that any other circuit court of appeals has decided differently a case dealing with this aspect of Texas law.

The decisional rule of the Fifth Circuit regarding matters of Texas law, as developed by circuit judges many of whom were Texas lawyers, provides a rational basis on which the court of appeals may act to resolve a case before it.[49] Following the guidance of that rule to resolve matters of Texas law to which the Texas courts of appeals have spoken, but the Texas supreme court has not, and where

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[46] 348 U.S. 310 (1955).
[47] 365 U.S. 731 (1961).
[48] 794 F.2d. at 948; page 18a, Petition Appendix A.
[49] Supra, note 43.

there is no indication of the position of the Texas supreme court, can hardly be characterized as reaching out to decide prematurely a question of state law, as Petitioner argues. This case in no way involves a decision by the court of appeals of a question on which substantial and uniform Texas authority is not available, and therefore in no way involves the situation presented by *Railroad Commission of Texas v. Pullman*[50], as Petitioner argues.

Despite the strained arguments which Petitioner puts forward in an effort to create one, it is quite apparent that there are no issues presented in the case as decided by the court of appeals which meet the standards of Rule 17 of the rules of this Court or any of the other criteria of national importance for review by this Court.

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[50] 312 U.S. 496 (1941).

CONCLUSION

The requested writ of certiorari to the court of appeals for the Fifth Circuit should be denied for the following reasons:

1. The United States Court of Appeals for the Fifth Circuit reached a principled and correct decision based on ample precedent in the jurisprudence of the State of Texas. In particular, there is no indication that there will be any change in the law of Texas on the point on which they rested their decision.

2. Under the circumstances of the case, there can be no question presented meeting the standards of national importance for review by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the above and foregoing brief by mailing them by certified mail, return receipt requested, to David S. Prince, Esq., 5400 Memorial Drive, Suite 103, Houston, Texas 77007.

_____

E. J. Silva

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C. A. G-84-184

LEXINGTON INSURANCE COMPANY

vs.

BENNETT EVANS GRAIN COMPANY, ET AL

MEMORANDUM AND ORDER

This controversy began as a suit for declaratory judgment on an insurance contract. Today this cause also involves claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968: article 21.21 of the Texas Insurance Code ("TIC"); and section 17.50 of the Texas Deceptive Trade Practices Act ("DTPA").

I.

Lexington Insurance Company ("Lexington") insured the property of Bennett Evans Grain Company ("Bennett"). Bennett stored grain for the Commodity Credit Corporation ("CCC") a division of the United States Department of Agriculture.[1] In August, 1983, Hurricane Alicia damaged Bennett's facilities. Bennett duly reported the loss to Lexington. Bennett claims that Alicia destroyed property including Building No. 2, its main storage building, and the grain stored therein. Lexington and Bennett settled the claims for damage to other Bennett property. Bennett claims that Lexington, through ABJ Adjusters, Inc. ("ABJ"), agreed that approximately $450,000.00 would settle the claim for Building No. 2 and the grain. Lexington allegedly rejected this amount and discharged ABJ. Lexington asserts that it questioned the extent of the claimed damage and whether part of the damage existed prior to Alicia.

[1] The CCC is not a party to this litigation.

Lexington retained GAB Business Services, Inc. ("GAB"). GAB's agent, Joseph Bonanno negotiated unsuccessfully with Bennett regarding Building No. 2 and the grain. Bennett claims that Bonanno agreed that the grain could be partially salvaged at a cost of $49,000.00 but that Lexington also wrongfully rejected this settlement. At Bonnano's request, the parties met on April 10, 1984. Jim Bennett, apparently the sole owner of Bennett, stated in deposition that Bonnano made him the following offer at the meeting:

> I'm not entertaining a claim on the [grain] at all. I will put a new face on your building and give you $100,000.00 to settle the entire claim. . . . You know, it's going to be awhile before you get a claim from CCC. Take the money and use it as you see fit.

Jim Bennett refused, negotiations broke down, and Bonnano allegedly sent a letter to CCC indicating that there was little damage to the grain and that settlement was unlikely.[2]

Lexington then filed this suit for declaratory judgment and to enjoin Bennett to allow inspection of the damaged premises. Bennett counterclaimed under the insurance contract, the DTPA, the TIC, and RICO, and impleaded GAB and Bonanno under RICO.

GAB and Bonnano move for summary judgment. Lexington moves for summary judgment on all claims other than the action on the insurance contract. Bennett moves to compel discovery; to strike Lexington's pleadings and for default or, in the alternative to require Lexington to deposit funds in the registry of the court; and for partial

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[2] In its third amended counter-claim and third-party claim, Bennett attempted to add a claim for tortious interference with a business relationship based on the letter to the CCC. The Court denied this motion for leave to amend. Thus, the Court now disregards any claims of damage based on tortious interference.

summary judgment. Pursuant to the standard for summary judgment set forth in *Harrison v. Byrd,* 765 F.2d 501, 504 (5th Cir. 1985), the Court grants the summary judgment motions of Lexington, GAB and Bonnano, and denies the summary judgment motion of Bennett. The Court denies Bennett's motions to compel and to strike. The Court first turns to Bennett's RICO claim.

II.

The gravaman of plaintiff's RICO action is the requirement of "at least two acts of racketeering activity" to demonstrate the required "pattern of racketeering activity." 18 U.S.C. § 1961(6). Bennett alleges three indictable predicate acts as defined in 28 U.S.C. § 1961(1)(B): 1) a bribe under 18 U.S.C. § 201, 2) mail fraud under 18 U.S.C. § 1341, and 3) wire fraud under 18 U.S.C. § 1343. Factually, these predicate acts stem from Bonnano's offer of $100,000.00 which plaintiff characterizes as an attempted bribe. The Court, of course, is not bound by Mr. Bennett's characterization of the events. Instead, the Court looks at the law and the evidence submitted by the parties.

Bribery under 18 U.S.C. § 201 requires an offer of something of value to a government official with the intent to influence some official act or have the official otherwise betray his public trust. *E.g., Parks v. United States,* 355 F.2d 167 (5th Cir. 1965) (per curiam). In deposition Jim Bennett stated that the offer of $100,000.00 and to put a new face on the building was a ridiculously low offer of settlement. Bennett alleges that Bonnano made the offer "behind the back" of the CCC, the owner of the grain. Yet Jim Bennett stated that even if he accepted the offer, he would still eventually have to pay the government for the damaged grain. Bennett's building with a new face—presumably, according to the deposition testimony,

replacing the tin facing blown off by Alicia—would still be damaged if Alicia had damaged more than the facing. Bennett has not attempted to show that the building belonged to another party. Bennett was the only beneficiary of the insurance policy.[3] Thus, Jim Bennett's statements thus raise an interesting question: why and how would an insurer bribe the insured to act against his own financial interests in settling his claim? The answer, of course, is that he could not. This scenario does not reveal an indictable act of bribery.

Assuming, however, that the offer was an attempted bribe, it was only one act. Jim Bennett stated in deposition that only at the meeting did Bonnano offer him a "bribe." If Bonnano had also made Bennett the offer over the telephone, *R.A.G.S. v. Couture, Inc. v. Hyatt,* 774 F.2d 1350, 1354-55 (5th Cir. 1985), might compel this Court to find two predicate acts. In *R.A.G.S.,* the plaintiff alleged that defendant or its lawyer twice mailed plaintiff the same fraudulent invoices. The trial court dismissed plaintiff's RICO action on the grounds plaintiff had not alleged or shown a pattern of racketeering activity because there was only one predicate act of mail fraud. The Court of Appeals reversed, holding that plaintiff factually alleged two indictable acts of mail fraud. *Id.* Here, a telephone call arranging a meeting or a letter discussing settlement is not a separately indictable act of bribery sufficient to establish a pattern of racketeering activity under *R.A.G.S.*

Bennett also alleges that Lexington, GAB, and Bonnano delayed settlement to force Bennett to settle its claim for less than its fair value as a result of financial pressures on Bennett. Bennett alleges that Lexington, GAB, and

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[3] Alvin State Bank intervened in this suit. This Bank claims that Bennett assigned all of its rights and interest in the insurance policy to the Bank on November 20, 1984. This was after the events giving rise to the alleged RICO claim.

Bonnano used the mails and telephone to further this "conspiracy" and to arrange the meeting where Bonnano attempted to bribe Mr. Bennett. Bennett contends that these are indictable acts of mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343. A scheme to defraud is an essential element of both offenses. *E.g., United States v. Schaffer,* 559 F.2d 678 (5th Cir. 1979) (per curiam) (mail fraud); *United States v. Foley,* 683 F.2d 273 (8th Cir. 1982) (wire fraud). Fraud consists of a false representation or material nondisclosure "reasonably calculated to deceive persons of ordinary prudence and comprehension." *Schaffer,* 559 F.2d at 679. Although Bennett's allegations suggest deplorable conduct in settling an insurance claim on the part of Lexington and its agents, the allegations do not show a scheme to defraud.

In conclusion, Bennett's RICO claims must be dismissed because Bennett fails to establish at least two predicate acts of racketeering activity pursuant to 18 U.S.C. § 1961.

III. Bennett's Texas Statutory Claim

Bennett sues pursuant to the Unfair Competition and Unfair Practices Act ("UCUPA"), Tex.Rev.Civ.Stat.Ann. art. 21.21, § 16 (Vernon 1981), and the DTPA, Tex.Rev.Civ.Stat.Ann. § 17.50 (Vernon Supp. 1986) for treble damages and attorneys' fees for unfair settlement practices and unconscionable conduct in the settlement of an insurance claim.

The issue requires the Court to interpret three interlocking, concurrently enacted consumer protection statutes. In 1973, the 63rd Texas Legislature enacted the DTPA, section 16 of article 21.21, and the Unfair Claim Settlement Practices Act ("UCSPA"), Tex.Rev.Civ.Stat.Ann. art. 21.21-2 (Vernon 1981). *See*

generally Comment, *An Insurer's Failure to Settle: Standing Under the Stowers Doctrine, Texas Deceptive Trade Practice Act, and Article 21.21 of the Insurance Code,* 34 Baylor L. Rev. 441 (1982) [hereinafter cited is *Comment*]. The Court therefore adheres to the requirement that it construe together concurrently enacted and in pari materia legislation. *Duval Corp. v. Sadler,* 407 S.W.2d 493 (Tex. 1966): *State v. Dyer,* 200 S.W.2d 813 (Tex. 1947).

The DTPA, article 21.21, and article 21.21-2, authorize state agencies to investigate and sanction statutory violations. Section 17.50 of the DTPA[4] and section 16 of

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[4] Tex.Rev.Civ.Stat.Ann. § 17.50 (Vernon Supp. 1986) provides in relevant part:

> (a) A consumer may maintain an action where any of the following constitute a producing cause of actual damages:
>
> (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter;
>
> (2) breach of an express or implied warranty;
>
> (3) any unconscionable action or course of action by any person; or
>
> (4) the use or employment by any person of an act or practice in violation of Article 21.21, Texas Insurance Code, as amended, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code, as amended.
>
> (b) In a suit filed under this section, each consumer who prevails may obtain:
>
> (1) the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed $1,000.00. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of $1,000.00. . . .

article 21.21[5] explicitly provide consumers with a private cause of action and the possibility of treble damages and attorneys' fees. Article 21.21-2, on the other hand, does not create a private cause of action; it only authorizes the Texas Board of Insurance Commissioners ("Board") to investigate and sanction unfair claims settlement practices. *See McKnight v. Ideal Mutual Insurance Co.*, 534 F.Supp. 362, 364 (N.D. Tex. 1982) (collecting Texas cases). Beyond the simple lack of language creating a private cause of action, this conclusion makes sense. Article 21.21-2 prohibits unfair claim settlement *practices*. Section 2 of 21.21-2 explicitly states that the unfair claim settlement acts must be committed with sufficient frequency to actually be a practice. Tex.Rev.Civ.Stat.Ann. art. 21.21-2, § 2 (Vernon 1981). Thus, a private cause of action for one unfair settlement would be inconsistent with section 2.

Bennett does not proceed directly under article 21.21-2. Rather, Bennett asks the Court to find a private cause of action the DTPA and the UCUPA. Because the Texas Supreme Court has not addressed this question, the Court must make an *Erie*-guess and rule as it believes that the

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[5] Tex.Rev.Civ.Stat.Ann.art.21.21, § 16 (Vernon 1981) provides in revelant part:

> (a) Any person who has been injured by another's engaging in any of the practices declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition and unfair and deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice may maintain an action against the company or companies engaging in such acts or practices.
>
> (b) In a suit filed under this section, any plaintiff who prevails may obtain:
>
> (1) three times the amount of actual damages plus court costs and attorneys' fees reasonable in relation to the amount of work expended . . . .

Texas Supreme Court would rule. *E.g., Green v. Amerada-Hess Corp.*, 612 F.2d 212, 214 (5th Cir.), *cert. denied*, 449 U.S. 952 (1980). *See generally* 19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4507, at 86-103 (1982).

The Court first looks to the structure of the acts. At least one Texas court has held, and this Court agrees, that the Texas Legislature intended to "seal off" unfair claim settlements from the expansive damage remedies of the DTPA and the TIC. *See Texas Farm Bureau Mutual Insurance Co. v. Vail*, 695 S.W.2d 692, 694 (Tex.Civ.App.—Dallas, 1985, writ requested) (quoting *Comment, supra*, at 455). By enacting 21.21-2, the 63rd Legislature showed that it clearly understood the nature of an unfair claim settlement. The 63rd Texas Legislature also clearly understood how to grant a private cause of action: it did so in section 16 of UCUPA and § 17.50 of the DTPA. By cross-referencing the DTPA and UCUPA, the 63rd Texas Legislature showed that it knew how to expressly import a private cause of action into one statute from another. Yet the Legislature did not create a private cause of action for unfair claim settlements in 21.21-2. Nor did the 63rd Texas Legislature explicitly import 21.21-2 into either the DTPA or the UCUPA.

The Court finally notes that if the DTPA or the UCUPA by their own terms prohibit unfair claim settlements, 21.21-2 is superfluous. The DTPA and the UCUPA authorize state agency action. If they prohibit unfair claim settlements, 21.21-2 authorizes nothing new.

The Court now addresses Bennett's specific arguments. Bennett contends that violations of 21.21-2 are actionable under section 16 of 21.21. The Legislature, however, expressly limited private actions under section 16 to violations of 1) section 4 of article 21.21, 2) the rules and regulation adopted by the Board under article 21.21,

and 3) DTPA section 17.46. The Legislature did not incorporate 21.21-2 into section 4 of article 21.21 and no language in section 4 could be construed to give Bennett a cause of action for a violation of article 21.21-2. *Chitsey v. International Lloyd's Insurance Co.*, 698 S.W.2d 766, 777 (Tex.Civ.App.—Austin 1985, writ requested).

Bennett next argues that it has a cause of action under the second prong of section 16, the Board adopted rules and regulations. The Board promulgated Rules 059.50.01.001-.005, which contain broad language prohibiting "an unfair or deceptive act or practice as defined by the provisions of the Insurance Code of Texas or as defined by these and other Rules and Regulations of the State Board of Insurance authorized by the Code." Bennett argues that this language in effect incorporates an action under article 21.21-2 into section 16. The Court disagrees with this tortious logic. *Cf. Chitsey,* 698 S.W.2d at 770. The rule as interpreted by Bennett would not be authorized by the Code. Unfair claim settlement practices are governed by article 21.21-2 and article 21.21-2 only authorizes Board sanctions, not private actions. Rules 059.50.001-.005 were promulgated under articles 21.20 and 21.21 which do not address unfair claim settlement practices.

Bennett furthermore argues that Rules 059.50.01.001-.005 incorporate Tex.Rev.Civ.Stat.Ann. art. 1.14-2, § 8(b) (Vernon 1981) into section 16. Section 8(b) prohibits an insurance agent from placing insurance with surplus line insurers that are not authorized by the Board to do business in Texas unless, inter alia, the insurer is "of good repute and provide[s] reasonably prompt service to its policyholders in the payment of just losses and claims." Under article 1.14-2, an agent may be penalized for violating article 1.14-2 and an insured may sue for breach of contract. The Court, however, will not contort section 8(a) into an action under section 16 for attorneys fees and

trebel [SIC] damages for an insurer's unfair claim settlement. Neither the rules Bennett relies on nor article 1.14-2 explicitly address an unfair claim settlement.

Bennett then turns to the third prong of section 16 of article 21.21—"any practice defined by section 17.46 of the [DTPA] as an unlawful deceptive trade practice"—and argues that Lexington violated DTPA section 17.46(a). Section 17.46(a) provides: "False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Section 17.46(b) lists specific false, misleading, or deceptive acts. Bennett does not allege or show a violation of subsection (b).

The Court begins by noting that when a consumer sues under the DTPA for a false, misleading, or deceptive act or practice, the consumer cannot sue under subsection (a). *See* Tex.Rev.Civ.Stat.Ann. 17.50(a) (Vernon Supp. 1986). Bennett essentially argues that although there is no private cause of action under the DTPA for violations of 17.46(a), the Legislature created one under the TIC in section 16 of article 21.21. The wording of section 16, however, belies this conclusion. It is tantological [SIC] to say that a "[f]alse, misleading, or deceptive act" defines an "unlawful deceptive trade practice." Based on this reasoning, in *Mobile County Mutual Insurance Co. v. Jewell,* 555 S.W.2d 903, 910-11 (Tex.Civ.App.—El Paso 1977, writ ref'd n.r.e.), the court held that the legislature intended that only violations of section 17.46(b) are incorporated into section 16 of article 21.21. *Accord General Accident, Fire and Life Assurance Corp. v. Legate,* 578 S.W.2d 509, 507 (Tex.Civ.App.-Texarkana 1974, no writ). *But see Allstate Insurance Co. v. Kelly,* 680 S.W.2d 595, 605 (Tex.Civ.App.—Tyler 1984, no writ) (citing dicta in *Royal Globe Insurance Co. v. Bar Consultants,* 577 S.W.2d 688 (Tex. 1979)).

Even if the legislature intended to incorporate subsection (a) into section 16, Bennett's claim must be dismissed. A plaintiff under article 21.21, § 16 must allege and show that he was injured as a result of an enumerated violation. Tex.Rev.Civ.Stat.Ann. art. 21.21, § 16(a) (Vernon 1981). Denial of insurance coverage is not a deceptive trade act or practice when the denial does not terminate or lessen the insurer's obligations or extinguish the insured'[s] rights under the insurance contract. *Reed,* 626 S.W.2d at 905; *Legate* 578 S.W.2d at 507; *Lone Star Life Insurance Co. v. Griffin,* 574 S.W.2d 576, 580 (Tex.Civ.App.—Beaumont 1978, writ ref'd n.r.e.). Bennett has not alleged or shown that any act of Lexington has extinguished any of Bennett's rights under the insurance contract.

In *Royal Globe,* 577 S.W.2d 688, 695 (Tex. 1979), the Texas Supreme Court held that in a DTPA suit against an insurer for post-loss representations, the plaintiff must show that he relied on a false, misleading, or deceptive representation and that he was damaged as a result. *Crossland v. Canteen Corp.,* 711 F.2d 714, 726 (5th Cir. 1983); *Jay Freemand Co. v. Glen Falls Insurance Co.,* 486 F.Supp. 140, 142 (N.D. Tex. 1980); *Molinar v. Plains Insurance Co.,* 660 S.W.2d 845, 850 (Tex.Civ.App.—Amarillo 1983, no writ). Plaintiff's alleged damages stem from the loss and Lexington's subsequent denial of the claim, not any representation that Lexington would pay $400,000.00.

In suits directly under the DTPA, section 17.50 provides that the deceptive act must be a "producing cause of actual damage." Furthermore, the plaintiff must be a consumer, one "who seeks or acquires by purchase or lease, any goods or services . . ." Tex.Rev.Civ.Stat.Ann. § 17.45(4) (Vernon Supp. 1986). An insurer's post-loss representations or denial of coverage is not in connection with a purchase or sale; therefore, Bennett is not a

consumer. *Rosell v. Farmers Texas County Mutual Insurance Co.,* 642 S.W.2d 278, 279 (Tex.Civ.App.—Texarkana 1982, no writ); *American Insurance Co. v. Reed,* 626 S.W.2d 898, 902 (Tex.Civ.App.—Eastland 1981, no writ); *Hartford Insurance Co. v. Carroll,* 575 S.W.2d 578, 580 (Tex.Civ.App.—Beaumont 1978, no writ). *But see Ranger County Mutual Insurance Co. v. Ginn,* 608 S.W.2d 730, 731-32 (Tex.Civ.App.—Tyler 1980, writ dismissed).

In conclusion, Bennett's claim under the TIC and the DTPA must be dismissed.

IV. Bennett's Common Law Bad Faith Claim

Bennett asserts a common law cause of action in tort for bad faith. Bennett contends that Lexington breached its implied duty to settle Bennett's claim fairly and in good faith. In *English v. Fischer,* 660 S.W.2d 521, 522 (Tex. 1983), the Texas Supreme Court held that there is no general duty of good faith implied in a contract. In a concurring opinion, Justice Spears noted that the Court was not overruling its recognition of an implied duty of good faith that arises from some special realtionship of the parties. *Id.* at 524. Justice Spears specifically noted *Stowers Furniture Co. v. American Indemnity Co.,* 15 S.W.2d 544 (Tex. Comm'n. App. 1929, opinion adopted), which recognized an insurer's obligation of good faith in settling a suit against the insured when the insurer is defending the action. *See also Aetna Casualty & Surety Co. v. Marshall,* 699 S.W.2d 876 (Tex.Civ.App.—Houston [1st Dist.] 1985, writ requested) (recognizing obligation of good faith of insurer under agreed judgment between insured and insurer).

Bennett's action, however, does not implicate the *Stowers* situation where the insured has a quasi-fiduciary responsibility to the insured. Rather, an insured's claim

under the policy places the parties in direct conflict. This Court holds that under *English,* Lexington has no implied duty to deal fairly and in good faith in adjusting Bennett's insurance claim. *Thompson v. M & B Construction Corp.,* 585 F.Supp. 561 (N.D. Tex. 1984). *See also Cook Consultants, Inc. v. Stewart Title Guaranty Co.,* 677 S.W.2d 718, 720-21 (Tex.Civ.App.—Dallas, 1984, no writ); *Texas Farm Bureau Mutual Insurance Co. v. Vail,* 695 S.W.2d 692, 694 (Tex.Civ.App.—Dallas 1985, writ requested).

V. Bennett's Discovery Motion

Bennett moves to compel discovery of Lexington's files relating to Bennett's claim ("claim file"). Tex.R.Civ.P. 186a prohibits discovery of the claim file. *Maryland American General Insurance Co. v. Blackman,* 639 S.W.2d 455, 457-58 (Tex. 1982). Pursuant to Fed.R.Evid. 501, the Court, therefore, must deny Bennett's motion.

VI. Bennett's Motion to Strike

Bennett moves pursuant to Tex.Rev.Civ.Stat.Ann. art. 1.14-1, § 6(a)1 (Vernon 1981) (unauthorized insurers) to strike and for default, or to require Lexington to deposit into the registry of the Court funds sufficient to secure the payment of a final judgment. The Court, however, finds that Lexington has sufficient assets from which to satisfy an adverse judgment. Therefore, the Court denies plaintiff's motion. Article 1.14-1 § 16(a)1.

VII. Bennett's Partial Summary Judgment Motion

Bennett moves for partial summary judgment for $99,235.00 and attorneys fees. Bennett moves for this amount based on a demand by the CCC made on Bennett for damaged rice that Bennett shipped to it. The Court finds, however, that there are fact issues material to Bennett's claims. The parties have tendered conflicting affidavits on the extent and cause of the damage to the grain. Therefore, the Court must deny Bennett's motion for partial summary judgment.

VIII.

In summary, it is ORDERED, ADJUDGED and DECREED as follows:

1. the motion for summary judgment of GAB and Joe Bonnano is GRANTED;

2. the motion for partial summary judgment of Lexington is GRANTED;

3. Bennett's motion to compel discovery is DENIED;

4. Bennett's motion to strike is DENIED; and

5. Bennett's motion for partial summary judgment is DENIED.

DONE at Galveston, Texas, this the 27th day of February, 1986.

/s/ Hugh Gibson

United States District Judge

APPENDIX B

SOUTH TEXAS NATIONAL BANK OF LAREDO,
Plaintiff,

VS.

UNITED STATES FIRE INSURANCE COMPANY,
Defendant.

CIVIL ACTION NO. L-83-34

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

SLIP OPINION

January 10, 1985

COUNSEL:

Donato D. Ramos, P.O. Box 1262, Laredo, Texas 78041, for Plaintiff

John W. Davidson, Terry Topham, Two Saga Center, 613 NW Loop 410, Suite 1000, San Antonio, Texas 78216, for Defendant

OPINION BY: KAZEN

South Texas National Bank (South Texas) has sued its insurer United States Fire Insurance Company (the company). South Texas seeks to recover under a Banker's Blanket Bond and Excess Fidelity policy (the policy). South Texas asserts that the policy covers its losses caused by the alleged dishonesty and fraudulent acts of its former President, Bristow, and Vice-President, Rios, in connection with loans to Francisco Lerma and his businesses. South Texas claims that it was injured because its former employees misbehaved during the course of their employment. The company has not reimbursed South Texas for this loss. The following motions are pending in this cause: (1) Defendant's motion for partial summary judg-

ment and motion to dismiss, (2) Defendant's motion for leave to amend, and (3) Defendant's motion to compel production of certain portions of federal examiners reports, filed August 24, 1984.

The company first asserts that South Texas cannot proceed under the Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. § 17.41 et. seq. (Vernon Supp. 1984) (D.T.P.A.), because South Texas did not give the company written notice at least thirty (30) days before filing this lawsuit. Id., § 17.50A. This admitted failure to give notice, however, does not require dismissal or judgment for Defendant. When "defect in the notice . . . [is] . . . brought to the attention of the trial court before trial[,] . . . the trial court should . . . abate the proceeding for thirty (30) days." Hollingsworth Roofing Co. v. Morrison, 668 S.W.2d 872, 875 (Tex. Civ. App.—Ft. Worth 1984, no writ). The Court would therefore be inclined to abate this action for thirty (30) days to allow the proper notice to be given. A serious question exists, however, as to the validity of a claim directly under the DTPA.

In the first place, it seems from South Texas' responsive brief that it intends to proceed instead under § 16 of article 21.21 of the Insurance Code. Section 16 provides a cause of action to remedy unlawful deceptive trade practices defined in § 4 of the Insurance Code, or in § 17.46 of the DTPA, or in rules and regulations adopted by the State Board of Insurance. Although a plaintiff may not claim a breach of warranty or unconscionability under § 16, Mobile County Mut. Ins. Co. v. Jewell, 555 S.W.2d 903, 911 (Tex. Civ.-El Paso 1977); writ ref'd n.r.e., per curiam, 566 S.W.2d 295 (Tex. 1978), it is not true—as contended by the company—that there is no private cause of action under § 16. See, Bragg, Maxwell, & Longley, TEXAS CONSUMER LITIGATION (2d Ed. 1983) § 7.03 (Consumer Litigation). Indeed the Texas Supreme

Court per curiam opinion refusing application for writ of error in Hi-Line Electric Company v. Travelers Insurance Cos., 587 S.W.2d 488 (Tex. Civ. App.-Dallas, 1979) writ ref. n.r.e., per curiam, 593 S.W.2d 953 (1980) was apparently written specifically to reject the lower court's holding that suit under article 21.21 of the Insurance Code must be based on the Deceptive Trade Practices Act.

The more difficult issue is which of the so-called "three prongs" described in § 16 apply to this case. The first prong refers to those practices defined in § 17.46 of the DTPA, and only those acts enumerated in § 17.46(b) may be considered. Mobile County Ins. Co. v. Jewell, supra. South Texas nowhere alleges in its Second Amended Original Complaint nor intimates in its brief which of the twenty-three specified acts applies to this case. The Court finds none to be applicable, including those specifically discussed by Judge Higginbotham in Jay Freeman Co. v. Glens Falls Ins. Co., 486 F.Supp. 140 (N.D. Tex. 1980). Likewise, under the second prong, nothing in § 4 of article 21.21 seems to apply to these facts. In its brief, South Texas relies primarily on the third prong, namely a practice condemned by "rules or regulations lawfully adopted" by the State Board. Specifically, South Texas invokes Regulation No. 18663, dated December 3, 1971.

Admittedly that Regulation, particularly sections 4 and 5 thereof, contains some rather sweeping definitions of unfair trade practices and misrepresentations. See, Consumer Litigation at § 7.04. Nevertheless, despite the Regulation, subsequent Texas cases have consistently held that denial of liability by an insurance company after the loss has occurred is not actionable under either the DTPA or article 21.21 of the Insurance Code. American Ins. Cos. v. Reed, 626 S.W.2d 898, 905 (Tex. Civ. App.—Eastland, 1981, no writ); General Acc. Fire & Life Assur. Corp., Ltd. v. Legate, 578 S.W.2d 505, 507 (Tex. Civ.

App.—Texarkana, 1979, writ ref'd n.r.e.); Lone Star Life Ins. Co. v. Griffin, 574 S.W.2d 576, 580 (Tex. Civ. App.—Beaumont, 1978, writ ref'd n.r.e.). South Texas attempts to distinguish these cases by defining its complaint to be not of a mere denial of coverage but rather of alleged misrepresentations pertaining to such things as when the Company would complete its post-loss investigation and make a decision on the claim. The Court finds this to be a distinction without a difference, particularly in view of the rationale of the above cited cases, namely that a post-loss denial of benefits does not terminate the Company's obligations or extinguish the insured's rights. Also there is no allegation that South Texas did anything in reliance on the alleged misrepresentations or was injured by them in any way other than the injury that would always occur when an insured is not promptly paid its demand. See, *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 694 (Tex. 1979). It is therefore ORDERED that South Texas' claim under the DTPA and § 16 of article 21.21 of the Insurance Code be DISMISSED.

The Defendant Insurance company also seeks summary judgment on the grounds that South Texas did not comply with the policy provision requiring it to furnish a sworn written proof of loss within 100 days "after discovery of loss". The policy defines discovery as occurring "when the insured becomes aware of facts which would cause a reasonable person to assume that a loss covered by the bond has been or will be incurred, even though the exact amount of details of loss may not then be known." South Texas does not challenge the applicability of these policy provisions. Instead, the main thrust of its response is the invocation of the provisions of article 5546, V.A.T.S., providing that whenever an insurance contract requires notice as a condition precedent to the right to sue, it shall be presumed that such notice has been given unless

lack of notice is specially pleaded under oath. This suit is in federal court, however, and the Federal Rules of Civil Procedure contain a provision clearly applicable. Rule 9(c) provides merely that the denial of the performance of a condition precedent "shall be made specifically and with particularity." The Defendant has done this in its original answer and in all subsequent amendments.

This issue is controlled by Rosales v. Honda Motor Co., Ltd., 726 F.2d 259 (5th Cir. 1984). There the Court explained that when a federal rule is clearly applicable, the analysis in Hanna v. Plumer, 380 U.S. 460 (1965), applies. Under that test, this Court concludes that Rule 9(c) does not abridge, enlarge or modify any substantive right and is within the scope of the Rules Enabling Act and a constitutional grant of power. Thus the Court concludes that Rule 9(c), Fed. R. Civ. P., controls over Article 5546 V.A.T.S. In any event, the Defendant has tendered an amended answer which would also comply with the state rule and the Court will GRANT leave to file that amendment.

The issue then becomes whether, under the policy in question, timely filing of a proof of loss is a condition precedent to recovery. South Texas relies on Aetna Life Ins. Co. v. Tipps, 98 S.W.2d 375 (Tex. Civ. App.-El Paso 1976, no writ) for the proposition that an untimely filing does not prevent recovery in the absence of a specific policy provision declaring a forfeiture. On the other hand, more recent authorities—including a decision by the Texas Supreme Court—appear to unequivocally hold that where an insurance contract requires proof of loss, a claimant's timely compliance with that requirement is a condition precedent to recovery. United States Fidelity and Guaranty Co. v. Bimco Iron & Metal Corp., 464 S.W.2d 353 (Tex. 1971); General American Life Ins. Co. v. Rodriquez, 641 S.W.2d 264, 269 (Tex. Civ. App.-Houston [14th Dist.] 1982, no writ). Unfortunately, neither of

those decisions contains the wording of the proof of loss provision actually being considered. In Anchor Casualty Company v. Bowers, 385 S.W.2d 568 (Tex. Civ. App.-Houston 1964), rev'd on other grounds, 393 S.W.2d 168 (Tex. 1965) (approves proof of loss analysis), the court held that "where an insurance policy makes the furnishing of a proof of loss a condition precedent to the enforcement of the policy," failure to comply bars recovery. Id. at 569. Again, however, the decision fails to describe the policy provision in that case, thus shedding little light on the question of what language is necessary to "make" the timely filing of a proof of loss a condition precedent to recovery. That question is not easily answered, as evident from the many conflicting statements and citations contained in COUCH ON INSURANCE 2d (Rev. ed.), § 49.

One Texas decision which does contain the pertinent policy language is Federal Surety Co. v. Smith, 41 S.W.2d 210 (Tex. Comm'n App. 1931, holding approved). The policy there required, inter alia, that proof of loss must be filed within ninety days after the date of the loss and that no action "shall be brought to recover on this policy prior to the expiration of forty days after proof of loss has been filed in accordance with the requirements of this policy." Id. at 212. The court concluded that this was a valid condition precedent with which the insured must comply in order to recover. The instant policy, in Section 5 of its general conditions and limitations, contains similar language. It provides that the insured shall furnish a sworn proof of loss within six months after discovery of the loss and that legal proceedings for the recovery of any loss shall not be brought prior to the expiration of sixty days after the filing of the proof of loss. Based on Federal Surety Co. v. Smith, supra, and other cases cited above, the Court would be inclined to hold that this language made the timely filing of a proof of loss a binding condition precedent to recovery. It appears, however, that

this language in Section 5 may have been superseded. The Defendant urges, and South Texas does not challenge, that a separate rider governs this point. That rider purports to be controlling despite anything to the contrary in the attached bond. The rider provides that proof of loss shall be made within 100 days after discovery of loss and that legal proceedings for recovery of the loss shall not be brought after the expiration of 28 months "after the cause of action shall have accrued." The provision that legal proceedings shall not be brought prior to sixty days after the filing of the proof of loss is eliminated, and the rider appears to sever the previous interrelationship between the requirement for filing a proof of loss and the actual filing of suit.

This rider causes the Court to raise the question of whether the proof of loss requirement in the rider is indeed a condition precedent to recovery. The Court invites further briefing on this point, not only as to any legal authorities, but also the circumstances surrounding the insertion of the rider into the policy and why it removes the provision that suit may not be filed until a specified period after the filing of the proof of loss.

This issue is potentially quite significant because South Texas, in its reply brief, apparently concedes that its proof of loss was not filed until June 24, 1982. Defendant company insists that this date is more than 100 days after South Texas became aware of facts which would cause a reasonable person to assume that an insured loss had occurred. Although the Court is not prepared to so rule as a matter of law at this time, this argument is not without some force. The Court particularly refers to the evidence that on February 23, 1982, the directors of South Texas authorized the bank's attorney "to calculate the loss resulting from the Lerma indebtedness and to submit a claim to the company for the full amount of the claim." It is difficult to imagine how South Texas could not have

discovered the Lerma loss when its directors officially voted to file a claim for that precise loss. On the other hand, the fact that the directors had knowledge of some irregularities and violations would not itself trigger the obligation to notify the company because of the rule that notice is not required until the bank has knowledge of "some specific fraudulent or dishonest act." Federal Deposit Insurance Corp. v. Lott, 460 F.2d 82, 87 (5th Cir. 1972). It is undisputed that South Texas had knowledge of at least two specific dishonest acts by Bristow no later than early February 1982 (see Exhibits Z1-3, Deposition of Fernando F. Zuniga). but it is not clear that these acts pertained to Francisco Lerma or whether they are the subject of the instant claim. The only specific act of misconduct that the Court can glean from the Second Amended Original Complaint is that Bristow was being given money, gold and automobile in return for making bad loans. Douglas G. McDonald has furnished an affidavit stating that the bank did not learn of these facts until April 2, 1982. If that be true, and if those are the only specific acts of misconduct known to the bank, the proof of loss may well be timely. The ultimate question would not be when the bank reasonably discovered a loss, but when it reasonably discovered a loss covered by the policy.

SUMMARY

The claim by South Texas for treble damages under the DTPA and under the Insurance Code is DISMISSED. Defendant's motion for leave to file its third amended answer is GRANTED. After reflecting on this memorandum, Defendant shall determine whether it still wishes to pursue the contention that the proof of loss was not timely filed. If so, Defendant shall file no later than February 1, 1985 a supplemental brief addressing the

questions of whether or not the proof-of-loss provision in this particular policy is a binding condition precedent and when South Texas acquired knowledge of some specific fraudulent or dishonest act related to the Lerma transactions. South Texas may reply on or before twenty five (25) days thereafter. The Court shall defer resolution of the dispute over discovering the Federal Examiner's reports until the foregoing issues are resolved.

APPENDIX C

COURT OF APPEALS
FIRST SUPREME JUDICIAL DISTRICT

NO. 01-85-0159-CV

GLEN ARNOLD, Appellant

v.

NATIONAL COUNTY MUTUAL FIRE INSURANCE COMPANY, Appellee

OPINION

On Appeal from the 151st District Court of Harris County, Texas Trial Court Cause No. 78-52226

The plaintiff, Glen Arnold, appeals from a take-nothing summary judgment, entered in favor of the defendant, National County Mutual Fire Insurance Company. We affirm.

In June 1974, Arnold was severely injured when the motorcycle he was driving was struck by a car driven by an uninsured motorist. Arnold was insured by National County Mutual under a policy that included "uninsured motorist" protection with a limit of $10,000. Arnold made timely demand for payment of the $10,000 limit, and an independent insurance adjusting firm employed by National County Mutual recommended, within six months following the date of the accident, that National County Mutual pay the entire policy limit to Arnold. But National County Mutual refused to pay, and Arnold filed suit against the uninsured motorist and National County Mutual. In December 1977, Arnold obtained a judgment against the uninsured motorist and National County Mutual in the amount of $17,974.75. National County Mutual then paid Arnold the $10,000 policy limit of his uninsured motorist coverage. Arnold filed this suit on December 27, 1978, alleging National County Mutual's

bad faith in handling his claim. On November 26, 1984, the trial court granted National County Mutual's motion for summary judgment.

In its motion for summary judgment, National County Mutual alleged four principal grounds of defense. It asserted: (1) that because it was a county mutual insurance company, it was not subject to the provisions of the Texas Insurance Code, specifically, article 21.21 (Vernon 1981), or the Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. secs. 17.41-17.63 (Vernon Supp. 1985), under which Arnold sued (2) that Arnold did not have a private right of action under the Unfair Claim Settlement Practices Act, Tex. Ins. Code Ann. art. 21.21-2 (Vernon 1981); (3) that under Texas law, there was no implied covenant of good faith and fair dealing in its insurance contract with Arnold, and therefore, regardless of motive, the company's handling of Arnold's claim created no cause of action for bad faith; and finally, (4) that Arnold's causes of action, if any, were barred by the applicable statutes of limitations, Tex. Rev. Civ. Stat. Ann. arts. 5526, 5527 (Vernon 1958). The trial court's judgment does not state the particular grounds upon which the judgment was entered. We must therefore examine the judgment in light of the grounds of defense set forth in the motion for summary judgment or raised in the appellant's response thereto.

We conclude that Arnold's suit is barred by limitations, as asserted under the fourth ground of defense in the motion for summary judgment, and so we need not consider the other issues.

Both in his pleadings and in his brief on appeal, Arnold contends that National County Mutual wrongfully refused to pay his claim within six months from the date of the accident on June 1, 1974. Assuming that National County Mutual's refusal to pay Arnold's uninsured moto-

rist claim gave him a cause of action, Arnold's rights were invaded at the time his claim was rejected.

This is not a "Stowers" case, as the appellant contends, where the statute of limitations begins to run when a judgment in favor of a third party is entered against the plaintiff in excess of his policy limits. *See Linkenhoger v. American Fidelity & Casualty Co.,* 260 S.W.2d 884, 887 (Tex. 1953); *see also G. A. Stowers Furniture Co. v. American Indemnity Co.,* 15 S.W.2d 544 (Tex. Comm'n App. 1929, opinion adopted). In a "Stowers" situation, the liability of the plaintiff's insurer arises because of its previous negligent rejection of the third party's settlement offer, which was within the insured plaintiff's policy limits. There, the plaintiff's damages cannot be determined until the judgment in excess of his policy limit is entered against him.

In the case at bar, the appellant's entire cause of action is based on the contention that National County Mutual wrongfully refused to pay his own claim at a certain time, i. e., within six months after the accident. A cause of action accrues, and limitations begin to run, when facts exist that authorize the person asserting a claim to seek relief in a court of competent jurisdiction, *Linkenhoger,* 260 S.W.2d at 886, and not, as the appellant contends, when a court finally determines that those facts do indeed entitle the plaintiff to relief.

Arnold did not file this suit until December 27, 1978, more than four years after the appellee's allegedly wrongful refusal to pay his claim, and therefore, his asserted causes of action, both in tort and arising from his insurance contract, are barred by limitations. Arts. 5526, 5527.

The judgment of the trial court is affirmed.

/s/ FRANK G. EVANS

FRANK G. EVANS
Chief Justice

Associate Justices Bass and Cohen also sitting.
No publication.

Judgment rendered and opinion delivered August 22, 1985.

True copy attest;

KATHRYN COX

Kathryn Cox
Clerk of the Court